Supreme Court, U.S.
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AUG 6 1979
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1978

No. 78-1888

EDWARD MAHER, PETITIONER

v.

VIRGINIA GAGNE

PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO PROCEED IN
FORMA PAUPERIS

The respondent, Virginia Gagne, respectfully moves pursuant to Rule 53, paragraph 1 of the Rules of this Court, that she be allowed to proceed in forma pauperis. Her affidavit is attached to this motion.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1978

NO. 78-1888

EDWARD MAHER, PETITIONER

V.

VIRGINIA GAGNE

AFFIDAVIT

I, Virginia Gagne, being duly sworn, depose and say in support of my motion for leave to proceed without being required to pay costs or fees:

1. I am the respondent in the above entitled case.

2. Because of my poverty, I am unable to pay the costs of said cause, pay for printing or give security for the same. I am employed by the Bass Plating Co. and receive a weekly net salary of $189.00, plus an additional $45 monthly from State Welfare. Out of this sum, I must support three children, two of whom are retarded, and provide partial support for a fourth. I have no other income, assets or savings.

3. The nature of said cause is briefly stated as follows: The petitioner claims in his petition for certiorari that counsel in this case are not entitled to attorneys fees under the Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. §1988 because the case was settled in the district court by consent decree. The petitioner argues that the appellate court erred in holding that the plaintiff was nevertheless a "prevailing party" within the meaning of the Act and thus entitled to fees.

Virginia Gagne
VIRGINIA GAGNE

Subscribed and sworn to before me this 11th day of July 1979.

David Hunt
NOTARY PUBLIC

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NO. 78-1888

EDWARD W. MAHER, COMMISSIONER OF
INCOME MAINTENANCE,
STATE OF CONNECTICUT,
Petitioner

v.

VIRGINIA GAGNE, INDIVIDUALLY AND
ON BEHALF OF OTHERS SIMILARLY SITUATED,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

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EDWARD W. MAHER, COMMISSIONER OF
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Petitioner,

v.

VIRGINIA GAGNE, INDIVIDUALLY AND
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Respondent

ON PETITION FOR A WRIT OF CERTIORI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECCND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Virginia Gagne, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Second Circuit's opinion in this case, entered March 9, 1979. That opinion is reported at 594 F.2d 336.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Petitioner's First Question Presented Ignores The Clear Precedent of This Court and Is Inconsistent With Decisions of Every United States Court of Appeals That Has Considered the Issue.

Petitioner's argument that the principles of sovereign immunity embodied in the Eleventh Amendment to the United States Constitution, prohibit fee awards against state officials under the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. §1988, (hereinafter, the Fees Act), in cases where the constitutional issues presented to the court were never formally resolved, either because judgement was entered on statutory grounds, or, as here, where the case was settled by consent decree, has been rejected by every court of appeals that has considered the issue. See, Lund v. Affleck, 587 F.2d 75, 76-77 (1st Cir. 1978); Bond v. Stanton 555 F.2d 172, 174-175 (7th Cir. 1977); cert. denied, 438 U.S. 916 (1978), Seals v. Quarterly County Court 562 F.2d 390, 393-394, (6th Cir. 1977), Kimbrough v. Arkansas

Activities Association 574 F.2d 423, 426-427 (8th Cir. 1978).[1]

The foundation of petitioner's contention is its allegation that Congress did not intend to abrogate the States' immunity in cases where a plaintiff prevails without a judicial determination that plaintiff has a meritorious constitutional claim, and alternatively, that if Congress did so intend, it exceeded its express authority under section 5 of the Fourteenth Amendment.

As regards petitioner's first claim, the legislative history of the Fees Act indicates that Congress was aware of and carefully evaluated competing considerations to reach its conclusion that fee awards should be made in cases terminated by consent decree, as well as in those cases that proceed to judgement on a "non-fee claim."

Contrary to petitioner's assertions (see petitioner's brief p. 6a), the legislative history is quite clear that Congress intended fee awards in cases such as this. The Senate Report[2] states that attorneys' fees should be awarded in a wide variety of cases, including those terminated by consent decree, citing, Kopet v. Esquire Realty Co. 523

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[1] Accord, Southeast Legal Defense Group v. Adams, 436 F. Supp. 891, 893-895, (D. Ore. 1977).

[2] S. Rep. No. 1011, 94th Cong. 2nd Sess. 5 (1976) U.S. Code Cong. & Admin. News at 5912-5913.

F.2d 1005 (2d Cir. 1975). In that case, and in Blau v. Rayette - Faberge, Inc. 389 F.2d 469 (2d Cir. 1968), the Court of Appeals for the Second Circuit held that counsel fees could be awarded whenever plaintiffs' efforts confer benefits on the class, including those obtained through settlement.

The House Report,[3] on a bill that was identical in every material respect to the Senate version of the Fees Act, directly addresses the situation in which a constitutional claim is joined with a non-fee statutory claim:

> To the extent a plaintiff joins a claim under one of the statutes enumerated in [the Fees Act] with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. .... In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive .... In such cases, if the claim for which fees may be awarded meets the "substantiality" test, see Hagans v. Lavine, [415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974)]; United Mineworkers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim so long as the plaintiff prevails on the non-fee claim arising out of a "common nucleus of operative fact".

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[3] H.R. Rep. No. 1558, 94th Cong. 2nd Sess. 4 n. 7 (1976).

Congress was aware that fee awards in such circumstances further the congressional goal of encouraging suits to vindicate constitutional rights without undermining the longstanding and deeply rooted judicial policies of avoiding unnecessary decisionmaking of important constitutional issues,[4] as well as encouraging the settlement of litigation.[5] Congress has reasonably accommodated the competing interests of the judicial and legislative branches of government, and its judgment should be accorded the well-deserved deference to which precedent indicates it is entitled.[6]

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[4] Spector Motor Co. v. McLaughlin 323 U.S. 101, 105 (1944).

[5] The court below stated:

> The State's interpretation of legislative intent would encourage plaintiffs to try cases in which reasonable settlement offers have been received, merely to ensure a fee award. Cf. Parker v. Matthews 411 F. Supp. 1059, 1062 (D.D.C. 1976), aff'd sub. nom., Parker v. Califano, 561 F.2d 320 (D. C. Cir. 1977); at 340 (citation omitted).

[6] This same legislative history persuaded the court below that:

> Given the legislative intent to authorize award of attorneys' fees to the prevailing party in settled cases and to avoid unnecessary decision of constitutional issues, we think it clear that Congress intended the test set forth in the House Report, to govern the award of attorneys' fees in suits that are settled as well as those that proceed to judgment on the "non-fee" claim.

594 F.2d at 340.

Petitioner alternatively contends, that even if Congress did intend to allow the awarding of fees in cases where the constitutional issues raised remained unresolved, it exceeded its power under §5 of the Fourteenth Amendment, in so acting. That argument, however, has already been substantially rejected by this Court. In Hutto v. Finney 437 U.S. 678, 693 (1978), this Court held that: "Congress has plenary power to set aside the states' immunity from retroactive relief in order to enforce the 14th amendment," and that, "When it passed the [Fees] Act, Congress undoubtedly intended to exercise that power and to authorize fee awards payable by the states," at 693-694. In Katzenbach v. Morgan, 384 U.S. 641 (1966), this Court, rejecting arguments identical to those being made by the petitioner here, quoted from Ex parte Comm. of Virginia, 100 U.S. 339, 345 (1879), in discussing the effect of section 5:

> 'It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective.'

The Court then went on to dismiss what is the heart of petitioner's argument:

> A construction of §5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the amendment.

384 U.S. at 648-649.

It is clear after Katzenbach v. Morgan, supra, and Fitzpatrick v. Bitzer 427 U.S. 445, 453 -456 (1976), that any appropriate means of implementing the Fourteenth Amendment, overrides the State's Eleventh Amendment immunity, and that great deference should be accorded Congress' determination as to what measures are appropriate to that end. Katzenbach v. Morgan, supra at 653.

As the court found below, Congress's approval of the Hagans v. Lavine jurisdictional standard in determining whether an award of fees should be made, effectively balances the interests of Congress in promoting suits to further constitutional rights, with the concern of the judiciary regarding the unnecessary decision of constitutional questions, and is thus an appropriate means of implementing the Fourteenth Amendment.

Petitioner's arguments, neither novel nor unique, have now been considered and rejected by this Court and every court of appeals that has considered them. The petitioner's effort to have this clear precedent reversed should therefore be rejected.

2. The Court Below Correctly Held That An Award of Attorneys' Fees Against a State Offical Fits Within the "Ancillary Effect" Exception to Edelman v. Jordan and Is Thus Not Barred By the Eleventh Amendment.

(1) Consideration of the second Question Presented is unnecessary for resolution of the case.

As the court below found, and the discussion above supports, The Civil Rights Attorney's Fees Awards Act, 42 U.S.C.§ 1988, enacted by Congress pursuant to its power under section 5 of the Fourteenth Amendment, provides the necessary statutory authorization to abrogate the Eleventh Amendment and allow an award of fees against a state official. It would thus be unnecessary for this Court to consider petitioner's additional argument that the court of appeals erred in holding that the award of attorneys' fees in this instance, fits within the "ancillary effect" exception to Edelman v. Jordan, 415 U.S. 651, 667 (1974), and is thus not barred by the Eleventh Amendment.

In Fitzpatrick v. Bitzer, supra, this Court expressly refused to review that part of the holding of the court below which would have provided an alternate basis upon which to justify an award of attorneys' fees against a state defendant. The Court said,

> In No. 75-283, the state officials contest the Court of Appeals' conclusion that an award of attorneys' fees in this case would under Edelman have only an "ancillary effect" on the state treasury and could therefore be permitted as falling outside the Eleventh Amendment under the doctrine of Ex parte Young. We need not address this question, since, given the express

> congressional authority for such an award in a case brought under Title VII, it follows necessarily from our holding in No. 75-251 that the Congress' exercise of power in this respect is also not barred by the Eleventh Amendment.

427 U.S. at 456-457 (citations omitted)

Similarly, here, it would be a departure from customary judicial procedure and precedent for this Court to decide the issue presented by the petitioner, unnecessary as it is, to the resolution of the case.

(2) The decision of the court of appeals below was correct.

Even if this Court were to break with precedent and consider reviewing the question of whether an award of attorneys' fees fit within the "ancillary effect" exception to Edelman, it is clear that the Court would conclude that the appeals court below was correct in its ruling that an award of attorneys' fees does, in fact, fit within that exception.

In Edelman, although this Court held that the Eleventh Amendment gave the States immunity from retroactive monetary relief, it reasserted the rule declared in Ex parte Young, 209 U.S. 123 (1908), that state officers are nevertheless not immune from prospective injunctive relief. Further, notwithstanding the Eleventh Amendment, States may be obligated to comply with costly federal orders if the costs are only "ancillary" to such a prospective order; "ancillary" being defined in Edelman as "a permissible and often an inevitable consequence of the principle announced in Ex parte Young, supra." at 667.

With particular regard to attorneys' fees, while this Court has not decided the issue squarely, its previous decisions would be consistent with a holding that attorneys' fees fit within the "ancillary effect" exception to Edelman. In Sims v. Amos 340 F. Supp. 691 (M.D. Ala.), aff'd 409 U.S. 942 (1972), the Supreme Court summarily affirmed a decision of the district court awarding attorneys' fees on the basis that "the state has no power to impart to its officers any immunity from such injunction or from its consequences, including the court costs incident thereto." 340 F. Supp. at 694 n.8. Although the later case of Alyeska Pipeline Service Co. v. Wilderness Society 421 U.S. 240, 269, n. 44 (1975) may have undercut the value of this case somewhat, respondent would argue that it still retains precedential value.[7]

In the recent case of Hutto v. Finney, supra, this Court upheld an award of attorneys' fees against a state defendant who had acted in bad faith, finding that it fit within the "ancilliary effect" exception to Edelman, inasmuch as the award was only a part of a prospective order enforcing federal law. While the award of fees here, was not made as a means of punishing the defendant for its failure to obey a court order, the respondent nevertheless maintains, that the connection between an award of fees for bad faith, and an award such as that made here, is so strong, and so closely connected to orders enforcing prospective relief, that if one is "ancilliary" so is the other.

One rationale used by the Supreme Court in Hutto to explain its approval of an award of fees against a state defendant under 42 U.S.C. §1988, despite the statute's lack of specific authorization for such an award, is the similarity it found between attorneys' fees and costs. The Court found support for its holding allowing an award of fees "as a part of costs" under the

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7 See, Gagne v. Maher, 594 F. 2d at 342 n.5; Bond v. Stanton, 528 F. 2d 688 (1976), remanded, 429 U.S. 973 (1977); Edelman v. Jordan, supra, at 671, and n.13.

statute in the fact that costs have traditionally been awarded by courts without regard for a state's Eleventh Amendment immunity. Thus in Fairmont Creamery Co. v. Minnesota, 275 U.S. 70 (1927), the Supreme Court upheld an award of costs despite the State's claim of immunity. An award of costs as authorized by Fairmont did not conflict with Edelman, the Court explained in Hutto, because:

> Unlike ordinary "retroactive" relief such as damages or restitution, an award of costs does not compensate the plaintiff for the injury that first brought him in to court. Instead, the award reimburses him for a portion of the expenses he incurred in seeking prospective relief.

437 U.S. at 695 n. 24.

The respondent, maintains, that an award of attorneys' fees generally serves the same purpose as an award of costs and thus should be treated the same. As the court stated in Souza v. Travisono, 512 F. 2d 1137, 1140-1141 (1st Cir. 1975);

> [Attorneys'] fees, to the extent allowable, seem to us generically to be the same as court costs. They are a part of the litigation expense deemed, for whatever reason, recoverable by the successful party or attorney. Any effort to distinguish for eleventh amendment purposes on the basis of theories of award would invite endless confusion. And to the extent states and state officials are, under our federal system, amenable to suit in federal courts, they should be responsible for costs and fees incidental to litigation to the same degree as others.

Like the Second Circuit Court of Appeals held in such cases as Fitzpatrick v. Bitzer, 519 F. 2d 559, 571-72 (2d Cir. 1975), aff'd in part, rev'd in part, 427 U.S. 445 (1976); Class v.-Norton 505 F. 2d 123, 126 (2d Cir. 1974), Jordan v. Fusari 496 F. 2d 646, 651 (2d Cir. 1974), and in this case, the First and Fourth Circuits have also decided that an award of attorneys' fees fits within the "ancilliary effect" exception to Edelman when the award is incident to a judgement granting prospective relief.[8]

While the Third[11] and Sixth[12] Circuits have disagreed, the respondent maintains that logic and more recent authority, in particular the Supreme Court decisions cited above, support the position taken by the First, Second and Fourth Circuits.

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8. Souza v. Travisono 512 F. 2d 1137 (1st Cir.) vacated and remanded on other grounds, 423 U.S. 809 (1975); Boston Chapter N.A.A.C.P., Inc. v. Beecher 504 F. 2d 1017, 1028-1030 (1st Cir.) cert denied, 421 U.S. 910 (1975); Thonen v. Jenkins 517 F. 2d 3, 7-8 (4th Cir. 1975). See also, Brandenburger v. Thompson 494 F. 2d 885, 888 (9th Cir. 1974), and Bond v. Stanton 528 F. 2d 688, 689-692, vacated and remanded in light of P.L. 94-559, 555 F. 2d 172 and n.1 (7th Cir. 1977).

11. Skehan v. Board of Trustees, 501 F. 2d 31, 41-42, and n.7 (3rd Cir. 1974), vacated and remanded, 421 U.S. 983 (1975), remanded, 538 F. 2d. 53 (1976) (en banc) cert. denied, 429 U.S. 979 (1976)

12. Jordan v. Gilligan 500 F. 2d 701, 705-10 (6th Cir. 1974), cert. denied, 421 U.S. 991 (1975)

CONCLUSION

The Court should reject petitioner's arguments that certiorari be granted in this case for at least two reasons. First, petitioner's argument that an award of attorneys' fees against the state conflicts with Edelman v. Jordan, supra, rests on the erroneous conclusion that Congress cannot, consistent with section 5 of the Fourteenth Amendment, displace a state's sovereign immunity in the absence of a judicial determination that a meritorious constitutional claim exists. This argument has previously been rejected by this Court and every court that has considered it. Secondly, since this case can be resolved without consideration of petitioner's second Question Presented, it would be a departure from precedent to grant the petition for certiorari to resolve any conflict among the various courts of appeals on this issue.

For these reasons, the petition for certiorari submitted by the petitioner, Edward Maher should be denied.

Respectfully submitted,

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